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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6094

HECTOR CRUZ,

Appellant,

v.

NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF
APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the order of the Court of Appeals of the State of New York on the ground that the Court lacks jurisdiction within the meaning of 28 U.S.C. 1257 because the order appealed from is not final, and on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

The Statute

This appeal raises the question of the constitutionality of New York Vehicle and Traffic Law sections 1192(1) and 1192(3). They provide:

> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.
>
> * * *
>
> 3. No person shall operate a motor vehicle while he is in an intoxicated condition.

A violation of section 1192(1), driving while impaired, is a traffic infraction punishable by a fine of up to fifty dollars, imprisonment of up to fifteen days, or both, and a mandatory 60-day suspension of driving privileges. New York Vehicle and Traffic Law (hereafter referred to as V.T.L.) §§ 510(2)(b)(i), 1800(b). A violation of section 1192(3), driving while intoxicated, is a misdemeanor punishable by a fine of no more than $500, imprisonment of no more than one year, or both, and a mandatory revocation of ones driver's license. V.T.L. §§ 510(2)(a)(iii), 1192(5).

The Facts and Proceedings Below

On the evening of January 28, 1978, a police officer observed appellant driving in an erratic manner on Third Avenue in Bronx County, New York. When appellant drove through a red light the officer stopped him and as appellant left his car, the officer detected a strong odor of alcohol on his breath, saw that appellant's eyes were watery and blood shot, that his speech was slurred, and that he was unsteady on his feet. When asked to produce his driver's license and registration appellant threw them at the police officer. After appellant admitted having a couple of drinks, he was placed under arrest. Appellant, who refused to take a breathalizer test, was charged by a misdemeanor complaint with violating New York Vehicle and Traffic Law section 1192.

After a preliminary hearing, appellant made a pretrial motion to dismiss the accusatory instrument on the ground, inter alia, that subsection 1 and 3 of section 1192 of the Vehicle and Traffic Law were so vague as to violate the due process clause of the Fourteenth Amendment.

U.S. Const. amend. XIV. In a decision dated October 31, 1978, a Judge of the New York City Criminal Court, granted defendant's motion. In a per curium opinion with one Justice dissenting, the Appellate Term, First Department, affirmed the Criminal Court's order dismissing the information. People v. Cruz, 99 Misc.2d 634 (App. Term, 1st Dept. 1979). However the Court of Appeals of the State of New York, finding the statute constitutional, reinstated the accusatory instrument, and remitted the case to the Criminal Court for further proceedings. People v. Cruz, 48 N.Y.2d 419 (1979). At the present time the case is pending in the trial court.

ARGUMENT

POINT ONE

THE COURT LACKS JURISDICTION TO HEAR THIS CASE BECAUSE THE COURT OF APPEALS ORDER IS NOT FINAL

The Court of Appeals of the State of New York rejected appellant's constitutional challenge and remitted this case to the Criminal Court of the City of New York where it is pending. Since there has been no final judgment, and this case does not fall within the collateral order exception to the final judgment rule, the order of the Court of Appeals is not "final" within the meaning of 28 U.S.C. 1257. Thus, the Court lacks jurisdiction to reach the merits of the case and should dismiss the appeal.

The final judgment in a criminal proceeding is the sentence. Parr v. United States, 351 U.S. 513, 518 (1956); Berman v. United States, 302 U.S. 211, 212 (1937). Since appellant has not been found guilty of any crime, let alone sentenced, it is obvious that there has been no final judgment in this case. Therefore, the question to finality must focus upon whether this case is one of the small classes of cases that falls within the "collateral order" exception to the final judgment rule as first announced in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546-47 (1949). To come within the exception, a case must pass three tests: (1) the decision must fully dispose of the question of the constitutionality of the state statute; (2) the decision must resolve an issue completely collateral from the principle issue in the case; and (3) the decision must involve an important right which would probably be irreparably lost if review had to await final judgment. United States v. MacDonald, 435 U.S. 850, 855 (1978); Abney v. United States, 431 U.S. 651, 658 (1977).

Although we recognize that the decision of the Court of Appeals has fully disposed of the constitutional question and is completely collateral to the central issue in the case, ie: whether or not appellant is guilty of the offenses charged, the third factor has not been satisfied. No important right of appellant would be "lost, probably irreparably" if review had to await final judgment. See eg, United States v. MacDonald, supra at 860. The order denying appellant's motion to dismiss on due process grounds is certainly reviewable after final judgment if appellant

is convicted of violating Vehicle and Traffic Law section 1192. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); United States v. MacDonald, supra at 860-61.

Although appellant cites a number of cases in support of his contention that the Court has jurisdiction, only two cases are worthy of discussion. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Court held that the judgment of the Delaware Supreme Court, rejecting a due process challenge to a state statute, was a final judgment. Id. at 195, n. 12. However, the due process challenge in Shaffer did not involve the question of vagueness as in the instant case, rather it concerned a question of jurisdiction which went to the very power of the state courts to entertain the action. Thus, the Court reasoned that, if the Delaware courts did not have jurisdiction there should be no trial at all. Id. In the case at bar there is no contention that the state court lacks jurisdiction. Similarily, in Abney v. United States, supra, the court held that a pretrial double jeopardy claim fell within the collateral order exception only because the very purpose of the Double Jeopardy Clause is to protect individuals "against twice being put to trial for the same offense." 431 U.S. at 661. Rather, the case at bar, is governed United States v. MacDonald, supra. In the instant case, appellant's due process claim, like the speedy trial claim involved in MacDonald, does not "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." See, United States v. MacDonald, supra at 861. Therefore, since appellant would not lose any right by waiting until there is a final judgment in this case, the court lacks jurisdiction to entertain this appeal.

POINT TWO

THIS CASE PRESENTS NO SUBSTANTIAL QUESTION

The question before the Court is whether subdivision 1 of New York Vehicle and Traffic Law section 1192, which prohibits driving while the ability to operate a motor vehicle "is impaired by the consumption of alcohol," and subdivision 3, which prohibits driving "while . . . in an intoxicated condition," are unconstitutionally vague in a case where the driver has refused to submit to any scientific test for determining the amount of alcohol he has consumed. It is manifest that this question is so unsubstantial as not to need further argument.

Like the New York Court of Appeals every other jurisdiction to deal with the question has had no difficulty distinguishing between intoxication and impairment, People v. Lambert, 395 Mich. 296, 235 N.W.2d 338 (1975); State v. Bryce, 243 A.2d 726 (Me. 1968), and has consistently rejected claims that such statutes are unconstitutionally vague. Brooks v. State, 41 Md. App. 129, 395 A.2d 1224 (Ct. Spec. App. 1979); Thompson v. People, 181 Colo. 194, 510 P.2d 311 (1973); See United States v. Channel, 423 F. Supp. 1017 (D. Md. 1976); Bass v. Commonwealth, 209 Va. 422, 164 S.E.2d 667 (1968). Appellant, on the other hand, can only support his position by citing lower court cases in New York, decided prior to the Court of Appeals decision in the instant case. Thus, it is obvious that there is no conflict between any state or federal courts since the decisions of the lower court's of New York have been effectively overruled by the Court of Appeals decision in the case at bar.

The Court of Appeals, recognizing that the vagueness doctrine of the due process clause requires that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, (Colautti v. Franklin, 439 U.S. 379, 390 [1979]; United States v. Harris, 374 U.S. 612, 617 [1954]; Conally v. General Construction Co., 269 U.S. 385, 391 [1926]), did not merely uphold the consitutionality of the statutes but construed the words "impaired" and "intoxicated". The Court of Appeals construed impairment to mean whether "by voluntarily consuming alcohol, . . . [the driver] has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." 48 N.Y.2d at 426-27 [emphasis added]. Recognizing that intoxication is a

greater degree of inebriation than impairment, the court construed intoxication to mean "when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." 48 N.Y.2d at 428 [emphasis added]. Thus, it is clear that when a driver's ability to operate a motor vehicle is adversely affected by alcohol to any extent he has violated Vehicle and Traffic Law section 1192(1). On the other hand, where a driver has consumed so much alcohol that his ability to operate a motor vehicle is so effected by alcohol that he is incapable of operating a motor vehicle as would a reasonably prudent driver, he has violated subsection 3 of Vehicle and Traffic Law section 1192.

Since, in determining whether a statute is unconstitutionally vague, this Court, does not merely deal with the statute on its face, but also looks at the interpretation given the statute by the state court, (Chaplinsky v. New Hampshire, 315 U.S. 568, 533 [1942], see Smith v. Goguen, 415 U.S. 570, 573 [1974]), it is clear that there is no merit to appellant's contention that there is no distinction between "impaired" and "intoxicated."

Finally, while it is true that whether an individual is convicted of the misdemeanor of driving while intoxicated or the traffic infraction of driving while impaired will depend on his degree of inebriation, this creates no constitutional problem. As this Court stated over 65 years ago, "the law is full of instances where a man's fate depends on his estimating rightly that is, as the jury subsequently estimates it, some matter of degree." Nash v. United States, 229 U.S. 373, 377 (1913). Therefore, since the court below has drawn a distinction between driving while impaired and intixicated, it is manifest that no substantial question is before this Court.

CONCLUSION

FOR THE REASONS STATED HEREIN, THIS APPEAL SHOULD BE EITHER DISMISSED OR AFFIRMED.

Respectfully submitted,

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